

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 January 2003

CASE NUMBER: 2002-LHC-235

OWCP NUMBER: 7-136984

IN THE MATTER OF

HUBERT PHIL CALVIN,

Claimant

v.

**CONOCO, INCORPORATED,
c/o ARM INSURANCE SERVICES,**

Employer

APPEARANCES:

Henri M. Saunders, Esq.
On behalf of Claimant

David L. Barnett, Esq.
On behalf of Employer

Before: Lee J. Romero, Jr.
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et seq., brought by Calvin Phil Hubert (Claimant) against Conoco Inc. c/o Arm Insurance Services (Employer). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on July 18, 2002, in Baton Rouge, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced fourteen exhibits, which were admitted, including: a recapitulation of medical bills; medical records and depositions of Drs. Anthony Ioppolo and John Clark; medical records from Terrebonne General Medical Center; earnings reports maintained by Employer from 1989-2001; Employer's discovery responses; and an accident report prepared by Employer.¹ Employer introduced sixteen exhibits, which were admitted, including: various Department of Labor filings; a vocational report of Cindy Harris; Claimant's deposition; Claimant's wage records; a Louisiana Uniform Motor Vehicle Traffic Crash Report; and a report of Claimant's alleged occupational injury.

Post-hearing, Claimant introduced, and I admit, five additional exhibits consisting of: Claimant's earnings report printout; an audit of medical charges; various medical bills and health insurance claim forms; a physical therapy note dated November 11, 1992; and a printout of medical payments made by Employer. Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated, (JX 1), and I find:

1. The date of the alleged accident/injury was September 26, 1992;
2. The injury occurred in the course and scope of Claimant's employment;
3. An employer-employee relationship existed at the time of the accident;
4. Employer was advised of the alleged accident on September 26, 1992;

¹References to the transcript and exhibits are as follows: trial transcript- Tr.____; Claimant's exhibits - CX ____, p. ____; Employer's exhibits - EX ____, p. ____; Joint Exhibits - JX __, p. ____.

5. Notices of controversion were filed on September 13, 2000, and May 14, 2001;

6. The date of the informal conference before the District Director was October 11, 2001;

7. Employer paid medical benefits until July 8, 1999, totaling \$21,901.31;

8. Employer paid compensation benefits as follows:

Temporary total disability: May 11, 1994 to June 12, 1995, at the rate of \$600.79 per week for a total of \$34,159.20

Permanent partial disability from January 5, 1999 to September 11, 2000, at the rate of \$272.19 per week for a total of \$23,952.72

II. ISSUES

The following unresolved issues were presented by the parties:

1. Claimant's average weekly wage and corresponding compensation rate;
2. Fact of accident and injury;
3. Nature and extent of injury;
4. Residual wage earning capacity and suitable alternative employment;
5. Credit for a salary continuation plan and other payments made in advance of Claimant's compensation payments;
6. Medical expenses;
7. Entitlement to compensation benefits;
8. Interest, penalties, and attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology

Claimant began work for Employer in 1989 as an operator, and was promoted to a systems specialist sometime between 1991 and 1992. (Tr. 40-42). As a system specialist, Claimant was in charge

of maintaining computerization systems, electrical equipment, pumps, and safety systems among other tasks. (Tr. 42). On September 26, 1992, Claimant suffered a workplace accident when he stood on an elevated forty-eight inch pipe wrench, in an enclosed space, in an effort to pry open a generator cover. (Tr. 43-45; CX 16, p. 1; CX 20, p. 1). Experiencing an immediate onset of low back pain, Employer flew Claimant to Terrebonne General Medical Center where he was instructed to follow up with his workers' compensation physician. (CX 8, p. 5).

Following treatment at Terrebonne General Medical Center, Claimant resumed working in an "as tolerated" capacity. (Tr. 52-53). Claimant's choice of physician was Dr. Ioppolo who originally opined Claimant suffered from lumbar radiculopathy related to a disc protrusion at L5. (CX 2, p. 88). Subsequent studies, however, did not substantiate this preliminary diagnosis, and on December 10, 1992, Dr. Ioppolo detected a compression fracture at L3. Id. at 85. Claimant seemed to respond to conservative treatment, and on January 25, 1993, Dr. Ioppolo released Claimant from his care to return on an as needed basis. Id. at 84.

Claimant continued to perform his job as a service specialist with Employer in an "as tolerated" position until May 10, 1994. (Tr. 53). Claimant told Dr. Ioppolo his chronic back pain eventually prevented him from climbing stairs, which was an essential part of his work. (Tr. 53; CX 2, p. 65; CX 12, p. 16). After he stopped working, Claimant received benefits pursuant to a salary continuation plan provided by Employer.

Unfortunately, Dr. Ioppolo was unable to identify the cause of Claimant's chronic back pain and he referred Claimant to Dr. Clark, a physical medicine and rehabilitation physician, for further treatment on June 26, 1997. (CX 2, p. 10). Dr. Clark commented there was no discernable pathology to explain the duration of Claimant's complaints or the degree of his functional impairment. (CX 13b, p. 18).

Meanwhile, Claimant cooperated with Employer's vocational rehabilitation counselor, obtained retraining, and found a position at Southeastern Louisiana University as a network administrator. (Tr. 56). Although he continued to experience chronic and persistent back pain, Claimant testified he was capable of performing that job. (Tr. 58-59). Employer first controverted Claimant's right to compensation on September 13, 2000, on the basis that "employer has paid LWEK compensation since 1-5-99 and claimant has voiced no disagreement." (EX 2, p. 1). Employer controverted a second time on May 14, 2001, raising a host of substantive issues forming the basis for this litigation.

B. Claimant's Testimony

Claimant testified that shortly after he received a degree in engineering technology, and an AA in computer technology, from Northwestern State University in 1989, he went to work for Employer as an operator. (Tr. 40-41). Sometime between 1991 and 1992, Employer promoted Claimant to a system specialist position, which dealt with the electronics and computerization of a platform. (Tr. 41-42). Specifically, Claimant was in charge of maintaining the electrical equipment, pumps, safety system, stability of floating platforms, and computerization systems. (Tr. 42). Claimant described this work as involving intense manual labor and a lot of stair climbing. (Tr. 42). In describing his workplace accident of September 26, 1992, Claimant testified:

One of the generators that we had - - we had three or four generators and when they get cut off, they sometimes locked up out there, and the generators provide the electricity for the platform. And what had to happen is, they had to go in and free the shaft up And they had to free it up by - - the armature locked up in there with the inside of the container of the generator, and then the shaft that came out of the container was what had to be freed up.

Now this was all in enclosed housing for safety reasons. . . . [I]t was about six foot tall [W]e had an operator there, Chuck Clements, and then Curtis Ponders. He was my supervisor. . . . Chuck Clement got inside and got a 48-inch pipe wrench and put it on the shaft, which is probably about 18 to 24 inches off the deck, and tried to jump on it.

He stood on top of it and he jumped on it, bouncing on it. And he couldn't get it freed up. And so I said, let me try it, and the housing was low enough to where I could put my back against the top of it, and I pushed down with my feet in a humped over position. . . . And that's when I had a loud pop in my back.

(Tr. 43-45).

Claimant testified that when he heard the pop in his back he was straining to push down on the pipe wrench. (Tr. 45). After hearing his back pop, Claimant stumbled off the wrench, exited the housing, and laid down on the deck of the platform. (Tr. 89). Claimant interpreted the accident report prepared by Employer as accurate, but when the report mentioned that he braced his back

against a wall, Claimant understood that to mean the ceiling of the enclosure. (Tr. 47).

After the accident, Claimant flew by helicopter to Terrebonne Hospital, where he asked the attending physician not to restrict him to light duty, but to limit his work "as tolerated" in hopes that his accident would not be considered a "lost time accident." (Tr. 50). Claimant returned to the platform the following day to finish his hitch and Employer allowed him to stay in bed. (Tr. 50-51). Immediately after his hitch ended, Claimant sought treatment from Dr. Ioppolo, who had cared for some members of his family. (Tr. 51).

Claimant continued to work for Employer following his injury in an "as tolerated" capacity, and was not forced into intense manual labor. (Tr. 52-53). In May 1994, Claimant quit working for Employer because he was having greater difficulty ascending and descending stairs due to leg and back pain. (Tr. 53). After Claimant left, Employer continued to pay him a salary for six months, and then his salary was reduced a certain percentage. (Tr. 54). After a year, Employer terminated Claimant and he began to receive disability benefits. (Tr. 54-55). Claimant explained that the gap in his medical treatment with Dr. Ioppolo from January 1993 to May 1994 was due to his concern that Dr. Ioppolo might restrict him to light duty, and Claimant did not want any lost time while working for Employer. (Tr. 67). When he eventually returned to see Dr. Ioppolo in May 1994, it was because his pain had increased to a point where he could not effectively climb stairs. (Tr. 82). Claimant was unaware of why Dr. Ioppolo reported he experienced a "spontaneous" reoccurrence of his back problems when his condition remained largely unchanged from his workplace accident. (Tr. 82).

After stopping work for Employer, Claimant enrolled in Novel School and eventually passed a test to become a certified network administrator. (Tr. 56). Employer provided vocational services, and Claimant obtained a job with Southeastern Louisiana University about a year after obtaining his certificate. (Tr. 56-57). At Southeastern, Claimant testified that he was in charge of maintaining the computer system for the College of Education, and he also provided technology advising and consulting to the staff. (Tr. 57-58). Claimant testified that he was physically able to perform his job with Southeastern, he had student workers to help him, and his current annual salary was \$30,500.00 per year. (Tr. 58-59).

Claimant testified in the mid-1980s he had other employment as a pastor at Shady Bowery Pentecostal Church in Walker, Louisiana earning approximately five-hundred dollars a month. (Tr. 82, 86). Claimant was also a pastor at New Life Pentecostal Church in

Boulder, Colorado for five years where his labor was uncompensated. (Tr. 82-83). In 1990, Claimant became the pastor of a Pentecostal Church in Amite, Louisiana, without salary, but he received pastoral expense consisting mostly of mileage reimbursement. (Tr. 83). Reimbursement for mileage expenses only started after Employer terminated his benefits. (Tr. 83). Since he stopped working for Employer, Claimant testified that his only source of income was from his job at Southeastern. (Tr. 86).

Regarding his motor vehicle accident in January 2000, Claimant testified he was coming home from work with his son when he ran over a mat that fell out of a pickup truck. (Tr. 60). Conditions were wet, and as soon as Claimant hit the mat - he tapped his brakes - which sent his truck into a skid, and he toppled over a steep embankment. (Tr. 60-61). Claimant was wearing his seatbelt and testified the accident did not affect him. (Tr. 61). Claimant's son was worried that he was hurt so he rode with his son to the hospital. (Tr. 61). When Claimant told the ambulance personnel he had a bad back, they decided that Claimant should have an x-ray for precautionary reasons. (Tr. 61). Claimant never sought any treatment, and did not miss any work, because of the accident. (Tr. 61-62).

C. Exhibits

C(1) Medical Records from Terrebonne General Medical Center

On September 26, 1992, Claimant arrived at the Terrebonne General Medical Center by helicopter complaining about lumbar pain after working with some equipment offshore. (CX 8, p. 5). Claimant arrived at the triage unit at 3:25 p.m., and after a set of x-rays, Claimant was discharged at 5:45 p.m., with instructions to follow-up with his workers' compensation physician. Id.

C(2) Employer's Report of Alleged Occupational Injury to Employee and Physical Therapy Note of Denham Springs

On September 26, 1992, Employer filled out an accident report which stated Claimant suffered an injury at 9:30 a.m. while attempting to manually roll a generator shaft using a pipe wrench. (CX 16, p. 1). The report, signed by Claimant, stated:

He was working in a close, cramped enclosure. Employee stood on the wrench with back against enclosure wall and pushed down on wrench with his feet. When pushing down on wrench, the employee allegedly felt a "pop" in his back and began to feel pain in his lower back area.

Id.

On November 9, 1992, Claimant reported to his physical therapist at Denham Springs that his accident occurred when he attempted to lift a roof using his back as a pry. (CX 20, p. 1). Claimant stated he felt a pop in his back and experienced immediate pain. Id.

C(3) Medical Records and Deposition of Dr. Anthony Ioppolo

A CT scan of Claimant's lumbar spine, performed on October 20, 1992, demonstrated: a slight annular disc bulge at L4-5; and a mild disc bulge at L5-S1. (CX 2, p. 2). On November 12, 1992, Dr. Ioppolo, a neurological surgeon, began treating Claimant for his complaints of severe back pain. (CX 2, p. 89). Dr. Ioppolo traced Claimant's injury to an accident at work on or about October 10, 1992,² where Claimant was working in an enclosed area trying to use his back and legs as a fulcrum. Id. Claimant related his pain was centralized in the lumbosacral spine, with a low backache, and radiating symptoms around the superior/anterior iliac crest. Id. Claimant also reported some buttock pain, localized right hip pain, and nonspecific minimal right leg pain. Id. In light of Claimant's physical exam, which demonstrated positive straight leg raises, and Claimant's CT scan, Dr. Ioppolo opined Claimant had lumbar radiculopathy related to a disc protrusion at L5-S1. Id. at 88. Dr. Ioppolo recommended a course of physical therapy, non-steroid anti-inflammatories, and muscle relaxants. Id.

On November 25, 1992, Claimant informed Dr. Ioppolo that physical therapy treatments did not resolve his radicular pains. (CX 2, p. 86). An MRI of Claimant's lumbar spine taken on December 1, 1992 revealed: a desiccated and slightly bulging disc at T12-L1; a desiccated circumferentially bulging disc at L1-2 causing ventral flattening of the thecal sac; a compression fracture of the superior end plates of L3; a desiccated and slightly bulging disc at L4-5; and a desiccated and centrally bulging disc at L5-S1. Id. at 1. There was no evidence of disc herniation or spinal stenosis. Id. After reviewing these results on December 10, 1992, Dr. Ioppolo opined Claimant had a compression fracture of the vertebral body of L3 which accounted for Claimant's reports of pain. Id. at 85. Claimant was neurologically intact, and Dr. Ioppolo gave Claimant a lumbosacral corset to wear. Id. On January 25, 1993, Dr. Ioppolo reported Claimant was doing much better, he had no need to actively follow Claimant's care, and he released Claimant to return only on a p.r.n. basis. Id. at 84. In a March 1, 1993 report to Employer's claims adjuster, Dr. Ioppolo recommended that Claimant obtain a supportive mattress to help ward off a surgical

² As stipulated, Claimant's injury occurred on September 26, 1992. (JX 1).

intervention. Id. at 82. At this time, Dr. Ioppolo believed that Claimant's continuing back pain was due to a subacute compression fracture. (CX 12, p. 14).

On May 11, 1994, Claimant returned to Dr. Ioppolo complaining of a spontaneous recurrence of his symptoms while working. (CX 2, p. 65). In a back and lower extremity examination, Claimant complained of lumbosacral pain on palpitation. Id. at 67. Claimant had positive straight leg raises at ninety degrees on his left producing back pain, and Claimant had a decreased pinprick sensation in his left foot. Id. Dr. Ioppolo opined Claimant's symptoms were a continuation or exacerbation of his 1992 injury, and he noted a course of physical therapy did not help Claimant. Id. at 62; (CX 12, p. 16). A June 2, 1994, MRI of Claimant's lumbar spine demonstrated: narrowing, desiccation and circumferential disc bulging at T12-L1; desiccation and minimal circumferential disc bulging at L1-2; a defect in the L3 end plate; minimal circumferential disc bulging at L4-5; and desiccation, minimal bulging, and accelerated changes in the facet joints at L5-S1. (CX 2, p. 3). In total, no real change was noted from Claimant's MRI dated December 1, 1992. Id. On June 6, 1994, Dr. Ioppolo remarked that Claimant still had a compression deformity at L3, but his results were unchanged, and recommended continued physical therapy. Id. at 40. A June 13, 1994 EMG impression indicated slight increased insertional activity in the right medial gastrocnemius and left gastrocnemius in what was basically a normal study of Claimant's lower extremities. Id. at 48. After reviewing the results of the EMG impression, Dr. Ioppolo recommended a TENS unit for Claimant and epidural steroid injections. Id. at 40. Dr. Ioppolo also testified that a normal EMG test did not rule anything out because EMGs sometimes showed false negatives. (CX 12, p. 19).

On August 15, 1994, Claimant continued to complain to Dr. Ioppolo about back pain, and he stated the steroid injections failed to provide relief although the TENS unit helped somewhat. (CX 2, p. 31). Because Claimant related he was unable to control his pain with activity modification, and experienced pain when climbing stairs working offshore, Dr. Ioppolo scheduled a functional capacity examination. Id. On October 12, 1994, Dr. Ioppolo related Claimant's functional capacity evaluation indicated Claimant could endure medium level work. Id. Dr. Ioppolo opined that even though Claimant continued to experience pain, he did not think there was anything he could do and hopefully Claimant would improve over time. Id. Dr. Ioppolo instructed Claimant to return only on a p.r.n. basis. Id.

On January 4, 1995, Claimant again sought treatment from Dr. Ioppolo complaining of lumbar pain with spasm and radiation into

his legs. (CX 2, p. 28). After steroid injections, Claimant returned on April 26, 1995, continuing to complain of pain. Id. at 24. Dr. Ioppolo noted if Claimant's pain became worse then he would schedule a myelogram. Id. On February 1, 1996, Claimant reported his pain was worse. Id. at 18; (CX 12, p. 22). On February 15, 1996, Dr. Ioppolo reviewed the results of Claimant's myelogram and post-myelogram CT scan and stated the results were qualitatively the same as his earlier MRI. (CX 2, p. 17). Claimant continued to complain of difficulty sitting, standing, and walking for excessive periods, and Claimant needed vocational rehabilitation. Id. Dr. Ioppolo again released Claimant to return only on a p.r.n. basis. Id.

On January 23, 1997, Dr. Ioppolo observed a positive straight leg raise at ninety degrees on Claimant's left side and Claimant continued to complain of persistent pain. (CX 2, p. 12). On February 26, 1997, Dr. Ioppolo noted a TENS unit failed to provide Claimant with any relief, and he opined Claimant should undergo another MRI scan. Id. An MRI of Claimant's lumbar spine performed on April 1, 1997 showed: an old compression deformity in the end plate at L3; and a desiccated and bulging disc at L5-S1 with facet disease. Id. at 4. In all, no change was noted from Claimant's June 2, 1994 MRI. Id.

In May 1997, Claimant underwent an EMG and nerve conduction study, which were essentially normal, but Claimant had a slight prolongation of his H waves suggesting a very mild early neuropathy even though there was no evidence of radiculopathy. (CX 2, p. 7). Dr. Ioppolo explained the term "neuropathy" is used in place of "radiculopathy" when the diagnostic findings indicate an internal problem with the nerve, such as diabetes or lead poisoning, opposed to "radiculopathy," which referred to something pressing on a nerve. (CX 12, p. 26). An acute injury to the nerve could cause either radiculopathy or neuropathy. Id. at 27. On June 26, 1997, Dr. Ioppolo noted Claimant was frustrated with his inability to find an adequate explanation for his physical symptoms, and recommended Claimant have a physical medicine and rehabilitation consultation. (CX 2, p. 10). Dr. Ioppolo opined there was no need for a further work-up or treatment by him if the physical medicine and rehabilitation referral failed to produce any relief. Id. In November 26, 2001, Claimant returned to Dr. Ioppolo stating he still suffered low back pain, pain in his left leg, and tingling in his foot. (CX 12, p. 28).

In his June 11, 2002 deposition, Dr. Ioppolo testified Claimant's compression fracture was "not something that's just going to go away." (CX 12, p. 17). When a vertebra is compressed, it doesn't regain its original height, and such a fracture could cause long term back pain, but was less likely to cause leg pain.

Id. at 17-18. Assuming Claimant was in good health prior to his 1992 workplace accident, Dr. Ioppolo opined Claimant's current condition was related to his workplace accident based on the temporal relationship of his symptoms and the nature of his compression fracture. Id. at 29-30. In general, back injuries were difficult to diagnose, and Dr. Ioppolo related he never found a satisfactory explanation as to what was causing Claimant's symptoms. Id. at 30. Comparing Claimant's bulging discs and facet disease to his compression fracture, Dr. Ioppolo felt that the most likely culprit for Claimant's back pain was his compression fracture. Id. at 40.

Dr. Ioppolo related an anterior compression fracture can occur from two different things: an axial load compressing the spine straight down, or by flexion such that the vertebra above strikes the vertebra below. (CX 12, p. 37). Dr. Ioppolo opined it was difficult for him to envision whether or not pushing down on a wrench could provide enough of an axial load to cause a compression fracture. Id. at 38. Claimant's activity would be more consistent with a compression fracture if he was bent over in a low enclosure and pushed on a wrench with his back against the ceiling. Id. at 39. Dr. Ioppolo expected the normal healing process for a compression fracture to be a period of months before the injury became less symptomatic. Id. at 41. The fact Claimant's injuries persisted for so long was very unusual considering the compression fracture was minor. Id. at 50.

C(4) Medical Records and Deposition of Dr. John Clark

On September 24, 1997, Claimant filled out an initial examination questionnaire for Dr. Clark, a rehabilitation specialist in orthopaedic medicine, indicating he experienced numb, stabbing, burning, or needle-like pain in his lower back and bilateral extremities extending down to his feet. (CX 13b, p. 29). Claimant self-rated his pain level as a seven out of 10, and indicated his pain increased with sitting and standing, but decreased if he lay on the floor. Id. at 31. Claimant only slept three to six hours a night, and his pain affected his ability to work because it was difficult to bend and stoop. Id. at 31-32. Claimant reported he did not obtain any relief from hot packs, electrical stimulation, TENS units, exercise, or back injections, but medications and a back brace helped. Id. at 34. Dr. Clark noted Claimant had a chronic lumbar pain condition with no definite neural encroachment syndrome identified by diagnostic tests. Id. at 16. Claimant's physical exam produced pain on flexion and positive bilateral straight leg raises at seventy-five degrees. Id. at 17. Dr. Clark's initial impression was post-traumatic chronic low back pain of unclear etiology and low grade disc

degeneration with facet arthropathy at L5-S1. Id. at 17. Dr. Clark further commented there was no discernable pathology to explain the duration of Claimant's complaints or the degree of his functional impairment. Id. at 18. Dr. Clark recommended physical therapy to reduce muscle tightness. Id.

On January 19, 1998, Claimant presented to Dr. Clark stating physical therapy did not change his level of pain, but Claimant was not always consistent in specifically pinpointing his pain. (CX 13b, p. 14. Claimant's physical therapist noted that Claimant's pain was more focal, but Dr. Clark could not objectively find anything wrong with Claimant outside of chronic lumbar pain. Id. Dr. Clark recommended Claimant enter a vocational rehabilitation program, and restricted Claimant to light duty work. Id.

On May 30, 2001, Claimant again presented to Dr. Clark complaining of persistent pain, self-rated between two and eight on a ten point scale. (CX 13b, p. 12). Dr. Clark's impression was chronic lumbar pain and he rescheduled physical therapy. Id. On June 27, 2001, Dr. Clark noted Claimant's leg sometimes gave way, and Claimant had radicular left leg pain extending to his foot. Id. at 11. After additional rehabilitation, Claimant noted he was doing "about the same" in an August 29, 2001 return visit. Id. Dr. Clark decided to schedule more diagnostic testing in an effort to determine the etiology of Claimant's symptoms. Id.

An MRI of Claimant's lumbar spine, dated August 14, 2001, exposed: an old compression fracture at L3, and multiple level disc degeneration of doubtful clinical significance. (CX 13b, pp. 20-21). A September 12, 2001 ultrasound of Claimant's lower extremity arteries did not reveal any evidence of peripheral vascular disease. Id. at 28. A preliminary standing lumbar myelogram report dated October 4, 2001, revealed: minimal circumferential disc bulging at L2-3 flattening the thecal sac and degenerative enlargement of the facet joints; small circumferential disc bulging at L5-S1; osteophytes causing narrowing of the foramen at L5-S1; and mild bilateral bony hypertrophy of the facet joints at L5-S1. Id. at 27. There was no qualitative change from Claimant's myelogram dated February 8, 1996, other than mild forminal narrowing at L5-S1. Id. Dr. Clark interpreted these results as demonstrating L5-S1 neural forminal narrowing, and even though the myelogram did not show it, the condition was producing symptomatic radiculopathy in the left leg, which would explain why Claimant had left leg give-way, pain, and numbness. (CX 13, p. 20). Dr. Clark performed a selective nerve root block, but it was of "no real benefit." Id. at 21. The fact that Claimant did not experience a decrease in pain led Dr. Clark to question whether narrowing of the S1 nerve root was the cause of Claimant's pain. Id.

An MRI of Claimant's cervical spine, performed on October 22, 2001, demonstrated: moderate neural foramina stenosis secondary to an uncinate joint spur formation at C5-6; minimal spinal stenosis secondary to disc-related osteophytes and buckling of the posterior elements at C5-6; and a minimal disc-related osteophyte at C6-7. (CX 13b, p. 25). When Claimant returned for treatment on April 22, 2002, Dr. Clark labeled it as "palliative." (CX 13, p. 23).

In his June 25, 2002 deposition, Dr. Clark stated Claimant's pain complaints were consistent with a patient who had L5 radiculopathy and a problem nerve root at L5. (CX 13, p. 18). The fact Claimant sometimes complained of left leg pain, followed by a later complaint of right leg pain, did not surprise or concern Dr. Clark based on Claimant's condition. Id. at 15. Regarding the inability to pinpoint the physical cause of Claimant's pain, Dr. Clark opined one or two percent of patients with back problems experience chronic intractable pain without having any anatomical lesion to explain it. Id. at 24. Of those, some amplify to "milk the system," and some are genuine complaints. Id. Dr. Clark opined that Claimant's pain symptoms were genuine because he presented in a consistent fashion, he is motivated, re-entered the workforce, and Dr. Clark found him believable. Id. at 24-25.

Regarding Claimant compression fracture that first appeared in a 1992 MRI, Dr. Clark stated any fracture in a healthy male was not trivial, but such a fracture should heal over the course of three or four months. (CX 13, p. 29). Dr. Clark never found any objective evidence of a permanently disabling medical condition. Id. at 45. Nonetheless, Dr. Clark stated chronic pain is itself a medical condition, and opined that Claimant's condition was not disabling because he could continue to do light work. Id. at 47. Liberalizing Claimant's work restrictions was dangerous because Claimant had a neuropathic component to his pain, and he should not do any activity which produced increased radicular pain. Id. at 49-50. A functional capacity examination would be the best indication of Claimant's work restrictions, but Dr. Clark stated he would limit Claimant's climbing and his work at elevations because of his leg "give-way" history. Id. at 53. Claimant's best choice was a light duty job that allowed for frequent position changes and did not entail lifting over thirty pounds. Id. Similarly, Claimant should avoid repetitive floor to waist lifting, and should avoid long distance driving. Id. Claimant would need treatment for his chronic pain condition for the rest of his life. Id. at 57.

C(5) Affidavit of Cindy A. Harris

Ms. Harris, a vocational counselor, called the office of Claimant's attorney on June 24, 2002, to schedule an appointment

with Claimant. (EX 10, p. 1). On June 27, 2002, Ms. Harris sent a letter to the office of Claimant's attorney, and on July 1, 2002, she attempted to schedule an appointment a second time by telephone. Id. Claimant's attorney did not respond to Ms. Harris's requests. Id.

C(6) State of Louisiana Uniform Motor Vehicle Traffic Crash Report

On January 3, 2000, Claimant was northbound on Interstate 55 when he lost control of his 1998 Chevrolet truck on wet road. (EX 18, pp. 1-4). There was no reported defects in the roadway, but the weather was rainy and Claimant's truck tires were reportedly worn or smooth. Id. at 3. Claimant's vehicle traveled down an embankment and struck a tree, rolled over, and came to a rest upside down. Id. at 4. Claimant's estimated speed was sixty-five miles per hour. Id. at 2-3.

C(7) Claimant's Wage Records

Claimant's W-2 statements reveal the following information:

| <u>Year</u> | <u>Employer</u> | <u>Medicare Wages and Tips</u> |
|-------------|----------------------------|--------------------------------|
| 2001 | Southeastern LA University | \$29,230.88 |
| 2000 | Southeastern LA University | \$27,430.70 |
| 1999 | Southeastern LA University | \$25,917.66 |
| 1996 | Conoco, Inc. | \$998.06 |
| 1995 | Conoco, Inc. | \$34,185.89 |
| 1994 | Conoco, Inc. | \$48,612.26 |
| 1993 | Conoco, Inc. | \$51,030.32 |
| 1992 | Conoco, Inc. | \$46,696.77 |
| 1991 | Conoco, Inc. | \$46,970.68 |
| 1990 | Conoco, Inc. | \$43,509.99 |
| 1989 | Conoco, Inc. | \$22,046.45 |

(CX 11, pp. 1-11).

In an LS-200, Report of Earnings, Claimant admitted to making the following annual salary while working for Southeastern Louisiana University:

| | |
|--------------------|-------------|
| 1/4/99 to 6/30/99 | \$26,000.00 |
| 7/1/99 to 9/30/00 | \$27,200.00 |
| 10/1/00 to 9/30/01 | \$28,200.00 |
| 10/1/01 to 7/24/02 | \$30,500.00 |

(EX 13, p. 1).

In his answers to interrogatories propounded by Employer, Claimant admitted to making the following annual salary:

| | | |
|------|-------------|-----------------------------------|
| 2000 | \$27,430.70 | Southeastern Louisiana University |
| 1999 | \$25,917.66 | Southeastern Louisiana University |
| 1995 | \$34,185.89 | Conoco, some work comp |
| 1994 | \$48,612.26 | Conoco, some work comp |
| 1993 | \$51,030.32 | Conoco |
| 1992 | \$46,696.77 | Conoco |
| 1991 | \$46,970.68 | Conoco |
| 1990 | \$43,509.00 | Conoco |

(EX 17, pp. 2-3).

Monthly wage reports for Claimant while he worked for Employer reveal the following:

| | |
|----------------|------------|
| August 1991 | \$3,740.00 |
| September 1991 | \$3,740.00 |
| October 1991 | \$3,780.00 |
| November 1991 | \$3,740.00 |
| December 1991 | \$3,790.00 |
| January 1992 | \$3,935.00 |
| February 1992 | \$3,935.00 |
| March 1992 | \$3,935.00 |
| April 1992 | \$3,935.00 |
| May 1992 | \$4,025.00 |
| June 1992 | \$3,935.00 |
| July 1992 | \$3,935.00 |
| August 1992 | \$4,176.00 |
| September 1992 | \$4,499.45 |

(CX 17).

IV. DISCUSSION

A. Contentions of the Parties

Claimant contends Employer terminated his disability benefits without any supporting evidence. Claimant argues he was injured in a September 26, 1992 workplace accident, and the symptoms of his injury are continuing. Claimant alleges the extent of his disability prevents him from performing anything other than sedentary to light work, and alleges he did not reach maximum medial improvement until January 19, 1998, when Dr. Clark recommended Claimant enroll in a vocational rehabilitation program for job re-entry. Under Section 10(c) of the Act, Claimant contends his earning capacity was \$51,030.32 per year, yielding an

average weekly wage of \$981.35 and a corresponding compensation rate of \$654.23.

Employer contends Claimant's average weekly wage at the time of his accident was \$901.19 under Section 10(c) of the Act. While Employer does not dispute Claimant was injured on September 26, 1992, Employer contests that Claimant's compression fracture could not have occurred as described in a contemporaneous accident report. Employer argues Claimant reached maximum medical improvement on January 25, 1993, at which time Claimant did not suffer any disability because Claimant was able to return to his former job. Employer further argues when Claimant returned to see his treating physician over a year later, he presented with different symptoms, and had no clear pathology to explain the duration of his pain symptoms. Employer alleges that Claimant's motivation is one of secondary gain. Employer also argues that Claimant was required to cooperate with the Employer's vocational rehabilitation specialist, and the undersigned should draw an adverse inference of no loss of wage earning capacity based on Claimant's failure to cooperate. Alternatively, Employer contends that Claimant could make an additional \$500.00 per month serving as a pastor in addition to his current employment. Further, Employer contends that it is entitled to a credit for wages paid to Claimant out of its disability benefits plan because the intention of the plan was to offset payments by any compensation owed. Finally, Employer argues that it is not liable for any medical expenses paid by Claimant's private health insurer.

B. Claimant's Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence, draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, 88 S. Ct. 1140, 20 L. Ed. 2d 30 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law, and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467, 88 S. Ct. at 1145-46; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Gilchrist v. Newport News Shipping and Dry Dock Co.*, 135 F.3d 915, 918 (4th Cir. 1998); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In this case, Employer contends Claimant did not make a credible witness because: 1) Claimant changed his description of the accident after Dr. Ioppolo stated Claimant could not have sustained his particular injury as described in a contemporaneous accident report; 2) Claimant could not recall how he was seen by a medic at the accident site; 3) Claimant alleged he suffered continuous pain from his injury but would go long periods of time without seeking any medical treatment; and 4) the medical evidence suggests it was very unusual for Claimant's particular injury to remain symptomatic. I find no merit in Employer's contentions.

First, Dr. Ioppolo stated Claimant would not likely sustain a compression fracture if he braced his back against a wall as indicated in Employer's accident report. (CX 12, pp. 38-39; CX 16, p. 1). The report in question was prepared by Ken Stanford, and only signed by Claimant. (CX 16, p. 1). The report stated Claimant was working in a cramped enclosure standing on a wrench with his feet. Id. Claimant, who is six foot tall, (CX 13b, p. 17), testified the housing enclosing the generator was also about six feet tall. (Tr. 44). Claimant testified that the wrench he stood on was about eighteen to twenty-four inches off the floor, thus, Claimant had to squeeze his six foot body into a space between four and four-and-one-half feet. (Tr. 44). Such spacial limitations are consistent with Claimant's assertion that he was pushing down on the wrench with his back against the ceiling of the enclosure and not the wall as reported by Mr. Stanford. Furthermore, a November 9, 1992 medical record prepared by Claimant's physical therapist noted Claimant injured his back while attempting to lift a roof using his back as a pry. (CX 20, p. 1). Claimant also explained when he signed the accident report, he understood the term "wall" to mean the "ceiling" of the enclosure. (Tr. 47).

Second, I find no reason to discredit Claimant because he could not remember the exact procedure whereby he came to see a medic. (Tr. 89-90). The accident occurred on September 26, 1992, and Claimant was asked to explain the exact sequence of events at the formal hearing, nearly ten years later, and considering the passage of time, I do not find that such a memory lapse renders the Claimant incredible.

Third, Claimant credibly testified as to why he did not seek continuous medical treatment in spite of the fact he experienced continuous pain. Following his accident, Claimant continued to work for Employer offshore in an "as tolerated" position. (Tr. 52-53). Claimant held the belief that if he was restricted to light duty then Employer would not allow him to work offshore. (Tr. 53). Claimant testified he did not seek any treatment from January 1993 to May 1994, because he did not want a lost-time accident. (Tr.

67). He was afraid Dr. Ioppolo might restrict him to light duty, and Employer was allowing him to work at non-strenuous tasks such as monitoring the computer and safety equipment. (Tr. 52). Claimant only returned to Dr. Ioppolo in May 1994 after he realized that he could no longer work offshore due to excessive climbing that aggravated his back pain. (Tr. 53). Thus, I find Claimant credibly testified he was in continuous pain from January 1993 to May 1994 even though he did not seek medical treatment.

Fourth, the fact Claimant continues to remain symptomatic following his 1992 injury is unusual as stated by both Drs. Ioppolo and Clark. Dr. Ioppolo stated it was very unusual, considering Claimant's relatively minor compression fracture to have continuing and persistent symptoms. (CX 12, p. 50). Nevertheless, Dr. Ioppolo related a compression fracture as "not something that's just going to go away" because when a vertebra was compressed, it never regained its original height. Id. at 17. Dr. Ioppolo also opined back injuries were difficult to diagnose and Claimant was one of those cases for which he never found a totally satisfactory reason to explain his back problems. Id. at 30. Likewise, Dr. Clark stated:

Well, the problem with low back pain is there has never been a good correlation of what you find on the MRI scans or myelograms with what is causing the pain. . . . We have people that have normal MRI scans and have severe back pain, and we have people that have terrible MRI scans and have no back pain. So that's why back pain is kind of a - - the more you see, the less you know about it, and he falls into that category of patients. There is not a lot of them. There are a few of those. I've seen probably 10,000 patients in my career. He falls in that one or two percent of patients that we can't find an anatomic lesion to explain it, but they have pain. In some cases people that present like that are clearly pain amplifying and trying to milk the system. In other cases of that, they are not. They are just people that have a pain problem we can't identify the cause of, but that doesn't mean they don't hurt. I think he falls into that later category. He has no anatomic lesion to explain his pain, but he's presented in a consistent fashion for over the five-year period of time that I've seen him, yet he's motivated, he's gone back into the work force, gone back to work So I think he is a believable patient.

(CX 13, pp. 24-25).

Accordingly, the fact that Claimant does not have pain symptoms traceable to an anatomical lesion does not affect

Claimant's credibility because both Drs. Ioppolo and Clark stated Claimant could have continuing low back problems not diagnostically traceable. I find no reason to impeach Claimant's credibility merely because he may suffer from an unusual back problem.

C. Causation

In establishing a causal connection between the injury and claimant's work, all factual doubts must be resolved in favor of the claimant. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), on reh'g, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998) (quoting *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. 556(d) (2002). By express statute, however, the Act presumes a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary. 33 U.S.C. § 920(a) (2002). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999); 5 U.S.C. 556(d) (2001).

Under the aggravation rule, an entire disability is compensable if a work-related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998)(pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995)(pre-existing back injuries); *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979)(compensating the effects of a progressive degenerative condition when that condition was aggravated by conditions at work), *aff'd sub nom.*, *Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981)

C(1) The Section 20(a) Presumption - Establishing a Prima Facie Case

Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a) (2002). To establish a prima facie claim for compensation, a claimant need not affirmatively establish a

connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this prima facie case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). See also *Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983)(stating a claimant must allege injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990)(finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

In this case it is uncontested that Claimant suffered an accident at work on September 26, 1992, while attempting to force open a generator cover. Dr. Ioppolo opined Claimant also suffered an injury and the symptoms of the injury were related to his workplace accident based on Claimant's reported good health prior to the accident, the temporal proximity between the onset of Claimant's symptoms and his accident, and the nature of Claimant's symptoms which were consistent with a compression fracture. (CX 12, pp. 29-30). Accordingly, I find that Claimant suffered a harm in that he has a compression fracture, low back pain syndrome, and his harm arose out of conditions at work which could have caused his harm or pain.

C(2) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether Employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995)(failing to rebut presumption through medical evidence that claimant suffered an unquantifiable hearing loss prior to his

compensation claim against the employer); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-45 (1990)(finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp.*, 14 BRBS 324, 326-28 (1981)(finding a physician's opinion based on a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

To rebut this presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption - the kind of evidence a reasonable mind might accept as adequate to support a conclusion - only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). See also, *Conoco, Inc.*, 194 F.3d at 690 (stating that the hurdle is far lower than a "ruling out" standard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd* mem., 722 F.2d 747 (9th Cir. 1983)(stating that the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995) (stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

In this case, Employer failed to rebut Claimant's prima facie case that his harm was related to his employment. Specifically, Employer cites different descriptions in the record as to whether Claimant braced his back against a wall or a ceiling, because if Claimant braced his back against a wall then Dr. Ioppolo opined that such activity would not result in a compression fracture. (CX 12, pp. 38-39). As discussed, *supra*, Part B, I found Claimant a credible witness, and in combination with a statement made to his physical therapist in November 1992 for the purposes of medical diagnosis and treatment, and considering the spacial limitations of the particular enclosure, I found Claimant pushed against the ceiling of the enclosure and not the wall. Dr. Ioppolo affirmed Claimant could have suffered a compression fracture by pushing against the ceiling. (CX 12, p. 39).

Furthermore, there is no substantial evidence in the record that Claimant's January 3, 2000, auto accident constituted an intervening or superceding cause of Claimant's chronic back problems. Claimant's uncontradicted testimony explained he did not suffer any injuries, he only went to the hospital on behalf of his son's potential injuries, and he only had his back x-rayed as a precaution because of his medical history. (Tr. 61-62). Claimant never sought any medical treatment for his automobile accident, and Dr. Clark's medical records reflect Claimant's next treatment date was not until May 2001. (Tr. 61-62; CX 13b, p. 12).

Additionally, the record contains no substantial evidence showing Claimant's chronic pain, which is a medical condition in itself, (CX 13, p. 47), was due to any factor other than his workplace accident. Dr. Ioppolo opined Claimant's chronic pain was causally related, (CX 12, pp. 29-30), and Dr. Clark, who had reservations expressing a causation theory due to his late involvement in Claimant's treatment, opined Claimant's current condition was probably related to his workplace accident. (CX 13, p. 9). Accordingly, I find Employer failed to rebut the presumption of causation, and based on the record as a whole, I find that a preponderance of the evidence compels the conclusion Claimant suffered a workplace injury on September 26, 1992, and the nature of that injury was not affected by Claimant's January 3, 2000 automobile accident.

D. Nature & Extent of Disability and Date of Maximum Medical Improvement

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10) (2002). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

D(1) Nature of Claimant's Injury

Following Claimant's workplace accident on September 26, 1992, Claimant flew to Terrebonne General Medical Center complaining about lumbar pain. (CX 8, p. 5). Following up with Dr. Ioppolo, Claimant underwent a CT scan of his lumbar spine on October 20, 1992. Claimant related that his pain was centralized in the lumbosacral spine, with a low backache and radiating symptoms around the superior/anterior iliac crest, and also reported some buttock pain, localized right hip pain, and nonspecific, minimal right leg pain. In light of Claimant's physical exam, which demonstrated positive straight leg raises, and Claimant's CAT scan, Dr. Ioppolo opined Claimant had lumbar radiculopathy related to a disc protrusion at L5-S1.

On November 25, 1992, Claimant told Dr. Ioppolo his physical therapy treatments did not resolve his radicular pains. (CX 2, p. 86). After reviewing MRI results on December 10, 1992, Dr. Ioppolo opined Claimant had a compression fracture of the vertebral body of L3 which accounted for Claimant's reports of pain. *Id.* at 85. Dr. Ioppolo believed that Claimant's continuing back pain was due to a subacute compression fracture. (EX 12, p. 14).

On May 11, 1994, Claimant returned to Dr. Ioppolo complaining of a spontaneous recurrence of his symptoms while working. (CX 2, p. 65). A June 2, 1994, MRI of Claimant's lumbar spine demonstrated no real change from Claimant's MRI dated December 1, 1992. *Id.* An EMG impression, performed by Dr. Rogers on June 13, 1994, was basically a normal study of Claimant's lower extremities. *Id.* at 48.

On February 1, 1996, Claimant reported his pain was worse and Dr. Ioppolo scheduled a myelogram in hopes of finding a reason why Claimant was having radiating leg pain. Id. at 18; (CX 12, p. 22). On February 15, 1996, Dr. Ioppolo reviewed the results of Claimant's myelogram and post-myelogram CT scan and stated the results were qualitatively the same as his earlier MRI. (CX 2, p. 17). An MRI of Claimant's lumbar spine performed on April 1, 1997 showed no change Claimant's June 2, 1994 MRI. Id.

In May 1997, Dr. Charles Kaufman, a neurologist, conducted an EMG and nerve conduction study. (CX 2, p. 7). Dr. Kaufman reported his study of Claimant was essentially normal, but Claimant had a slight prolongation of his H waves, which suggested a very mild early neuropathy, even though Dr. Kaufman did not find any evidence of radiculopathy. Id.

On September 24, 1997, Claimant self-rated his pain level as a seven out of 10, and indicated his pain increased with sitting and standing, but decreased if he lay on the floor. (CX 13(b), pp. 29-31). Claimant only slept three to six hours a night. Id. at 31-32. Dr. Clark noted Claimant had a chronic lumbar pain condition with no definite neural encroachment syndrome identified by diagnostic tests. Id. at 16. On January 19, 1998, Dr. Clark could not objectively find anything wrong with Claimant outside of chronic lumbar pain. Id. at 14. On May 30, 2001, Claimant complained of persistent pain, which he self-rated between two and eight on a ten point scale. Id. at 12. Dr. Clark's impression was chronic lumbar pain. Id.

An MRI of Claimant's lumbar spine, dated August 14, 2001, exposed: an old compression fracture at L3, and multiple level disc degeneration of doubtful clinical significance. (CX 13b, pp. 20-21). A September 12, 2001 ultrasound of Claimant's lower extremity arteries did not reveal any evidence of peripheral vascular disease. Id. at 28. A preliminary standing lumbar myelogram report dated October 4, 2001, revealed no qualitative change from Claimant's myelogram dated February 8, 1996 other than mild forminal narrowing at L5-S1. Id. at 27. Dr. Clark interpreted these results as demonstrating that Claimant had L5-S1 neural forminal narrowing, and even though the myelogram did not show it, it was producing symptomatic radiculopathy in the left leg, which would explain why Claimant had left leg give-way, pain, and numbness. (CX 13, p. 20). Dr. Clark performed a selective nerve root block, but it was of "no real benefit." Id. at 21. The fact that Claimant did not experience a decrease in pain led Dr. Clark

to question whether narrowing of the S1 nerve root was the cause of Claimant's pain. Id.

An MRI of Claimant's cervical spine, performed on October 22, 2001, demonstrated: moderate neural foramina stenosis secondary to an uncinate joint spur formation at C5-6; minimal spinal stenosis secondary to disc related osteophytes and buckling of the posterior elements at C5-6; and a minimal disc related osteophyte at C6-7. (CX 13b, p. 25).

In his June 11, 2002 deposition, Dr. Ioppolo testified Claimant's compression fracture was "not something that's just going to go away." (CX 12, p. 17). When a vertebra is compressed, it doesn't regain its original height, and such a fracture could cause long term back pain, but was less likely to cause leg pain. Id. at 17-18. Comparing Claimant's bulging discs and facet disease to his compression fracture, Dr. Ioppolo felt that the most likely culprit for Claimant's back pain was his compression fracture. Id. at 40.

In his June 25, 2002 deposition, Dr. Clark stated Claimant's pain complaints were consistent with a patient who had L5 radiculopathy and a problem nerve root at L5. (CX 13, p. 18). Dr. Clark never found any objective evidence of a permanently disabling medical condition. Id. at 45. Nonetheless, Dr. Clark stated chronic pain is itself a medical condition. Id. at 47.

Accordingly, I find that the nature of Claimant's injury is multiple level bulging and slightly desiccated discs, facet disease at L5-S1, mild foramina narrowing at L5-S1, a compression fracture at L3, mild early neuropathy, and pain consistent with L5 radiculopathy and a problem nerve root at L5, which Claimant stated ranged between two and eight on a ten point scale.

D(2) Extent of Claimant's Injury

On September 26, 1992, Claimant treated at the Terrebonne General Medical Center, and received instructions to follow up with his workers' compensation physician. (CX 8, p. 5). Claimant requested of the attending physician, and later requested of Dr. Ioppolo, not to restrict him to light duty, but allow him to work "as tolerated." (Tr. 50-53). Working in that capacity, Claimant was not required to perform the intense manual labor he undertook before his injury, and Employer allowed him to monitor computers

and safety equipment. (Tr. 52-53). On November 25, 1992, Dr. Ioppolo gave Claimant a lumbosacral corset to wear, and on January 25, 1993, Dr. Ioppolo reported Claimant was doing much better, he had no need to actively follow Claimant's care, and released Claimant to return only on a p.r.n. basis. (CX 2, pp. 84-85). In a March 1, 1993 report to Employer's claims adjuster, Dr. Ioppolo recommended Claimant obtain a supportive orthopaedic mattress to help ward off a surgical intervention. Id. at 82.

Claimant quit working for Employer in May 1994 because he experienced intolerable back pain while climbing, which was a regular part of his job duties. (Tr. 53). On May 11, 1994, Claimant returned to Dr. Ioppolo complaining of a spontaneous recurrence of his symptoms while working. (CX 2, p. 65). Dr. Ioppolo opined Claimant's symptoms were a continuation or exacerbation of his 1992 injury, and he noted a course of physical therapy did not help Claimant. Id. at 62; (CX 12, p. 16). On June 6, 1994, Dr. Ioppolo remarked that Claimant still had a compression deformity at L3, but his results were unchanged, and he recommended continued physical therapy. Id. at 40.

On August 15, 1994, Claimant continued to complain to Dr. Ioppolo about back pain. (CX 2, p. 31). He stated the steroid injections failed to provide relief although the TENS unit helped somewhat. Id. Because Claimant related he was unable to control his pain with activity modification, and experienced pain when climbing stairs working offshore, Dr. Ioppolo scheduled a functional capacity examination for Claimant, and recommended vocational rehabilitation. Id. On October 12, 1994, Dr. Ioppolo related Claimant's functional capacity evaluation indicated Claimant could endure medium level work, and Dr. Ioppolo opined even though Claimant continued to experience pain, he did not think there was anything he could do in regards to treatment, and hopefully Claimant would improve over time. Id. Dr. Ioppolo again instructed Claimant to return only on a p.r.n. basis. Id.

On February 15, 1996, Claimant continued to complain that he had difficulty with sitting, standing, and walking for excessive periods, and Dr. Ioppolo opined Claimant needed vocational rehabilitation. (CX 2, p. 17). Dr. Ioppolo again released Claimant to return only on a p.r.n. basis. Id.

In his June 11, 2002 deposition, Dr. Ioppolo testified Claimant's compression fracture was "not something that's just going to go away." (CX 12, p. 17). When a vertebra is compressed, it doesn't regain its original height, and such a fracture could

cause long term back pain, but was less likely to cause leg pain. Id. at 17-18. Dr. Ioppolo expected the normal healing process for a compression fracture to be a period of months before the injury became less symptomatic. Id. at 41. The fact Claimant's injuries persisted for so long was very unusual considering the compression fracture was minor. Id. at 50.

On September 24, 1997, Claimant filled out an initial examination questionnaire for Dr. Clark indicating he experienced numb, stabbing, burning, or needle-like pain in his lower back and bilateral extremities extending down to his feet. (CX 13b, p. 29). Claimant self-rated his pain level as a seven out of 10, and indicated his pain increased with sitting and standing, but decreased if he lay on the floor. Id. at 31. Claimant only slept three to six hours a night and his pain affected his ability to work because it was difficult to bend and stoop. Id. at 31-32. Dr. Clark further commented there was no discernable pathology to explain the duration of Claimant's complaints, or the degree of his functional impairment. Id. at 18. Dr. Clark recommended physical therapy to reduce muscle tightness. Id.

On January 19, 1998, Claimant presented to Dr. Clark stating physical therapy did not change his level of pain, but because Dr. Clark could not find anything wrong with Claimant outside of chronic lumbar pain, Dr. Clark recommended Claimant enter a vocational rehabilitation program, and restricted Claimant to light duty work. (CX 13b, p. 14). In May 2001, Claimant related that his pain levels fluxuated between two and eight on a ten point scale. Id. at 12. On June 27, 2001, Dr. Clark noted Claimant's leg sometimes gave way, and Claimant had radicular left leg pain extending to Claimant's foot. Id. at 11. After additional rehabilitation, Claimant noted he was doing "about the same" in a August 29, 2001 return visit. Id. When Claimant returned for treatment on April 22, 2002, Dr. Clark labeled it as "palliative." (CX 13, p. 23).

Regarding Claimant's compression fracture that first appeared in a 1992 MRI, Dr. Clark stated any fracture in a healthy male was not trivial, but such a fracture should heal over the course of three or four months. (CX 13, p. 29). Dr. Clark never found any objective evidence of a permanently disabling medical condition. Id. at 45. Nonetheless, Dr. Clark stated chronic pain is itself a medical condition, and opined that Claimant's condition was not disabling because he could continue to do light work. Id. at 47. Increasing Claimant's work restrictions was dangerous because Claimant had a neuropathic component to his pain, and Claimant

should not do any activity that produced increased radicular pain. Id. at 49-50. A functional capacity examination would be the best indication of Claimant's work restrictions, but Dr. Clark stated that he would limit Claimant's climbing and his work at elevations because of his leg "give-way" history. Id. at 53. Claimant's best choice was a light duty job that allowed frequent position changes and did not entail lifting over thirty pounds. Id. Similarly, Claimant should avoid repetitive floor to waist lifting, and should avoid long distance driving. Id. Claimant would need treatment for his chronic pain condition for the rest of his life. Id. at 57.

I find the extent of Claimant's injury such that he could continue to work in his former position as modified by Employer immediately following his injury until May 10, 1994.³ Beginning on May 11, 1994, Claimant could tolerate limited stair climbing and could function at a light to medium level of work.⁴ (EX 2, p. 31).

³ Claimant testified that he quit working for Employer in May 1994. (Tr. 53). Employer's LS-208, detailing compensation payments made to Claimant, shows Claimant's disability payments began on May 11, 1994. (EX 4, p. 1). Accordingly, I find Claimant was able to perform his former job as modified until May 10, 1994.

⁴ Light Work is defined as: "Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity or condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible." DICTIONARY OF OCCUPATIONAL TITLES Appendix C (4th ed. 1991).

Medium Work is defined as: "Exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical Demand requirements are in

Claimant's pain is characterized as numb, stabbing, burning, and needle-like, and fluxuates between two and eight on a subjective ten point scale. (CX 13b p. 12). Claimant's pain limits his ability to sit, stand, and walk for excessive periods. (CX 2, p. 17). Claimant should not work at elevations, lift over thirty pounds,⁵ engage in repetitive floor to waist lifting, driving long distances, and should work in a job allowing frequent position changes. (CX 13, pp. 53-57).

D(3) Date of Maximum Medical Improvement

I find that Claimant reached maximum medical improvement on January 25, 1993. On December 10, 1992, Dr. Ioppolo opined Claimant had a compression fracture at L3. (CX 2, p. 85). Claimant was neurologically intact, and Dr. Ioppolo directed Claimant in the use of a lumbar corset. Id. On January 25, 1993, Dr. Ioppolo reported Claimant was doing much better, he had no need to actively follow Claimant's medical care, and he discharged Claimant on a p.r.n. basis. Id. at 84. Claimant did not return for medical treatment until May 1994. Id. at 65.

Dr. Ioppolo opined a compression fracture should heal within a matter of months. (CX 12, p. 50). Likewise, Dr. Clark explained a compression fracture should heal over the course of three to four months. (CX 13, p. 29). I note that Claimant was injured on September 26, 1992, and when Claimant presented to Dr. Ioppolo on January 25, 1993, four months after his accident, his compression fracture had reached permanency because both treating physicians opined it should have healed by that time, and no subsequent diagnostic study demonstrated any change in Claimant's compression fracture. (CX 2, pp. 1, 3, 17; CX 13b, pp. 20-21, 27).

Regarding Claimant's numerous bulging and desiccated discs, the radiologist found them to be of doubtful clinical significance,

excess of those for Light Work." Id.

⁵Dr. Clark, who imposed the thirty pound lifting restriction, stated a functional capacity evaluation would be the best indication of Claimant's functional capacity. (CX 13, p. 53). As noted, supra, footnote 4, Dr. Clark's restrictions are very similar to the limitations imposed by Dr. Ioppolo's functional capacity exam. I also note that Dr. Ioppolo stated he would defer to Dr. Clark's work restrictions after 1997 if Dr. Clark had "good reason." (CX 12, pp. 31-32).

(CX 13b p. 21), and diagnostic studies of Claimant's spine have remained largely unchanged since the date of his accident. (CX 2, p. 1; CX 13b, pp. 20-21). Similarly, after Claimant presented to Dr. Ioppolo on January 25, 1993, stating he felt much better and after Dr. Ioppolo released Claimant from his care, there is no evidence in the record that Claimant's pain ever improved further. (CX 2, p. 84). Rather, the record indicates that Claimant's pain condition deteriorated to the point Claimant quit his job on May 10, 1994. Dr. Ioppolo stated Claimant's future treatment would consist of continued conservative care. (CX 12, p. 32). Similarly, Dr. Clark stated Claimant needed continued medical care for the rest of his life consisting of pain medication, medication management, and periodic physical therapy. (CX 13, pp. 57-58). Accordingly, I find that Claimant is not undergoing treatment with a view toward improvement, his condition has stabilized, and his condition has not improved any since January 25, 1993.

E. Failure to Cooperate with Employer's Vocational Expert

Employer contends in its brief that Claimant's refusal to cooperate in vocational rehabilitation testing should result in a denial of benefits under the Act because Employer was deprived of the opportunity to establish a residual wage earning capacity at a rate higher than Claimant's former employment. An employer bears the burden of showing that there is suitable alternative employment available to the claimant which the claimant can realistically secure considering his age, education, physical, and medical background. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). An employee has no duty to submit to a vocational evaluation on employer's request under the Act.⁶ See *Jenson v. Weeks Marine, Inc.*, 33 BRBS 97, 98-99 (1999) (affirming finding by ALJ that the claimant was permanently and totally disabled when the claimant refused to cooperate with the employer's vocational expert); *Simpson v. Seatran Terminal of California*, 15 BRBS 187 (1982) (reversing order by district director suspending

⁶ Section 7(d) of the Act provides that at any time the employee refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, Secretary, or administrative law judge, the claimant's compensation may be suspended during the period of refusal. 33 U.S.C. § 907(d) (2002). By its express terms this provision applies only to medical and not vocational examinations of the claimant. *Mendez v. Bernuth Shipping, Inc.*, 11 BRBS 21 (1979), aff'd 638 F.2d 1232 (5th Cir. 1981) (Table); *Morgan v. Asphalt Construction Co.*, 6 BRBS 540 (1977).

compensation payments for the claimant's failure to cooperate in vocational rehabilitation) (Ramsey dissenting). Rather, citing the dissenting opinion of Judge Ramsey in Simpson, the Board has determined:

Although Turner holds specifically that a claimant must establish due diligence in seeking a job only after employer locates suitable available jobs, we believe that it is consistent with Turner and Tarner to require that the employee cooperate in rehabilitation evaluations. We hold that an employee must, if possible considering his medical condition, reasonably cooperate with employer's rehabilitation specialist; the employee cannot without good reason simply refuse to meet with the specialist, as Chief Judge Ramsey has stated:

[I]t is clearly reasonable to require that claimant undergo evaluation in order that employer may understand the nature of his skills and abilities and assist claimant in his return to the job market. To allow claimant to refuse an ordered rehabilitation evaluation for fear that employer may discover claimant is able to work or that employer will then be able to locate an available job leads us to results inconsistent with the purposes of the Act. If claimant is capable of performing available work he is not permanently totally disabled. . . . The Act does not provide employment benefits for employees who are able to perform a job but do not wish to work.

Villasenor v. Marine Maintenance Indus., Inc., 17 BRBS 99, 101-02 (1985) (citing Simpson, 15 BRBS at 193).

Considering the fact that a claimant has no statutory duty to submit to a vocational evaluation, and considering the policy reasons enunciated by Chief Judge Ramsey, the Board held in Villasenor, that when a claimant unreasonably refuses to meet with a vocational expert, that factor must be evaluated in considering the extent of the disability. Id. Accord Dangerfield v. Todd Pacific Shipyards Corp., 22 BRBS 104, 109-10 (1989) (determining the ALJ's finding that claimant was only partially disabled due to her failure to cooperate with vocational experts, and in assigning a residual wage earning capacity consistent with the prevailing

minimum wage, was reasonable and supported by substantial evidence). A failure to submit to vocational evaluations, however, does not automatically result in a finding of a residual wage earning capacity, it is but one factor for the judge to determine in the context of the entire record. Jensen, 33 BRBS at 99 (affirming award of total disability when the employer produced only generic jobs and industry descriptions without showing the general background needed for employment, wages, physical or mental requirements); Villasenor, 17 BRBS at 102 (remanding case to consider the relevance, if any, of the claimant's lack of cooperation); Cruz v. May Ship Repair, 23 BRBS 167 (1990) (ALJ) (excusing claimant's lack of vocational cooperation when the employer's vocational expert had met with the claimant's previous employer, spoke with the claimant's physician, and had received the claimant's medical records). Accordingly, a failure to submit to vocational evaluation is not grounds to suspend compensation benefits, but is evidence in considering the extent of Claimant's injury in evaluating his residual wage earning capacity.

F. Residual Wage Earning Capacity and Suitable Alternative Employment

F(1) Prima Facie Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981); P&M Crane Co. v. Hayes, 930 F.2d 424, 429-30 (5th Cir. 1991); SGS Control Serv. v. Director, Office of Worker's Comp. Programs, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to any employment, only that he cannot return to his former employment. Elliot v. C&P Telephone Co., 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171 (1986).

Here, Claimant's former job as a system specialist entailed maintenance of electrical equipment, pumps, safety systems, stabilizing floating platforms, and maintaining computerization systems. (Tr. 42). Claimant testified the job involved a lot of stair climbing and intense manual labor. (Tr. 42). When Claimant

returned to his former position he worked "as tolerated," meaning he was not required to engage in intense labor and his work was easy because all Employer required him to do was monitor the computer and safety equipment. (Tr. 52-53). Thus, Employer modified Claimant's his former work taking into consideration his physical limitations. On May 10, 1994, Claimant quit working for Employer because he was not able to tolerate ascending and descending stairs due to his back pain. (Tr. 53). Accordingly, I find Claimant was able to continue in his former employment as modified from September 26, 1992 to May 10, 1994. Beginning on May 11, 1994, Claimant established a prima facie case of total disability because he could no longer perform his former position as a systems specialist as modified by the Employer.

F(2) Suitable Alternative Employment

Once the prima facie case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991) (crediting an employee's statement he would have constant pain in performing another job). An employer may establish suitable alternative employment retroactively to the day Claimant reached maximum medical improvement. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is

reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

F(3) Claimant's Residual Wage Earning Capacity

Employer argues that Claimant can earn an additional \$500.00 a month as a pastor of his church.⁷ Claimant testified he became the pastor of the Pentecostal Church in Amite, Louisiana but did not collect a salary. (Tr. 83). Claimant testified the church was small and it even had trouble reimbursing his expenses following his loss of disability payments from Employer. (Tr. 83). Claimant already holds a full-time position at Southeastern Louisiana University, and Employer failed to cite any authority that suitable employment for establishing a post-injury wage earning capacity includes jobs a claimant could work on the weekends, in excess of a full-time position. In any event, under Turner, Employer bears the burden to show the availability of suitable jobs in Claimant's community. Employer failed to identify any jobs as a part-time pastor which were available in Claimant's community, and failed to show that such jobs were reasonably available to Claimant considering his age, background, experience, geographical area or physical limitations. Furthermore, there is no evidence in the record that Claimant was ever paid for his actual services as a pastor in the Amite Pentecostal Church since obtaining that position in 1990, before his workplace injury. Because Claimant did not receive wages for his services as a pastor, because Employer did not show the availability of any paid positions as a pastor in Claimant's community, and because Claimant already works full-time, I do not find Claimant has an additional residual wage earning capacity as a church pastor.

⁷This \$500.00 figure was derived based on a position Claimant held as a pastor in Walker, Louisiana during the mid-1980s. (Tr. 82, 86).

Claimant admitted he was capable of performing his job as a certified network administrator at Southeastern Louisiana University which he obtained through the vocational rehabilitation services of Employer. (Tr. 58-59). Claimant acknowledged that his current annual salary was \$30,500.00 per year, or \$586.54 per week. Claimant obtained his job on January 4, 1999, at an annual salary of \$26,000.00, and he obtained a raise on July 1, 1999, increasing his annual rate to \$27,200.00. (EX 13, p. 1). On October 1, 2000, Claimant earned another raise elevating his annual salary to \$28,200.00, and on October 1, 2001, Claimant again received a raise elevating his annual salary to its current level of \$30,500.00. Id. Accordingly, I find that Employer established suitable alternative employment and a residual wage earning capacity as reflected by Claimant's job as a network administrator.

I do not find it appropriate to increase Claimant's residual wage earning capacity based on his failure to meet with Employer's vocational counselor. This is not the case envisioned by Judge Ramsey where a claimant who is fully capable of work refuses to meet with a vocational counselor out of fear that the employer may discover that ability to work. Here, Claimant participated in a vocational rehabilitation retraining program sponsored by Employer, and obtained a job consistent with his rehabilitation vocational training. In this instance, I do not find the weight afforded to Claimant's refusal to cooperate in additional vocational services changes the extent of his permanent partial disability.

G. Computation of Claimant's Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a worker's average annual earning capacity, 33 U.S.C. § 910(a)-(c) (2002), which is then divided by fifty-two to arrive at the average weekly wage, 33 U.S.C. § 910(d)(1) (2002). *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821 (5th Cir. 1991). Consequently, I must determine under which provision of the Act to proceed.

G(1) Section 10(a)

Section 10(a), which focuses on the actual wages earned by the injured worker, is applicable if a worker has "worked in the same employment . . . whether for the same or another employer, during substantially the whole year immediately preceding his injury". 33 U.S.C. § 910(a). *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821 (5th Cir. 1991); *Duncan v. Washington Metropolitan Area Transit*

Authority, 24 BRBS 133, 135-36 (1990). When an employee has a variable work schedule, Section 10(a) is not appropriate in determining the average weekly wage. *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98, 101 (1997)(finding that Section 10(a) was not appropriate when a claimant could not establish that he was a five or six day a week employee and could not state the number of days that he worked). By its terms, Section 10(a) envisions employees who are either five day a week or six day a week workers. Here it is undisputed that Claimant worked offshore in either seven day or fourteen day hitches. Accordingly, Claimant was neither a five day nor a six day worker and Section 10(a) does not apply.

G(2) Section 10(b)

Where Section 10(a) is inapplicable, the application of Section 10(b) must be explored prior to the application of Section 10(c). *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-43 (9th Cir. 1980), rev'g 8 BRBS 692 (1978). Section 10(b) applies to an injured employee who was working in permanent or continuous employment at the time of injury, but did not work "substantially the whole year" prior to his injury within the meaning of Section 10(a). *Gatlin*, 936 F.2d at 821; *Duncan*, 24 BRBS at 135; *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153 (1979). Section 10(b) uses the wages of other workers in the same employment situation as the injured party and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole year preceding the injury, in the same or similar employment, in the same or neighboring place. 33 U.S.C. § 910(b). However, where the wages of the comparable employee do not fairly represent the wage earning capacity of the injured claimant, Section 10(b) should not be applied. *Palacios*, 633 F.2d at 842; *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), vac'd in part on other grounds, 24 BRBS 116 (CRT) (5th Cir. 1991); *Lozupone*, 12 BRBS at 153. Here, there were no wages of a comparable worker available and Section 10(b) is inapplicable.

G(3) Section 10(c)

If neither of the previously discussed sections can be applied "reasonably and fairly," then determination of Claimant's average annual earnings pursuant to Section 10(c) is appropriate. *Gatlin*, 936 F.2d at 821; *Walker v. Washington Metro. Area Transit Authority*, 793 F.2d 319, 322 (D.C. Cir. 1986); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218 (1991). The judge has broad discretion in determining the annual earning capacity under

Section 10(c), *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 105 (1991), *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991), keeping in mind that the prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." *Cummins v. Todd Shipyards*, 12 BRBS 283, 285 (1980). In this context, earning capacity is the amount of earnings Claimant would have had the potential and opportunity to earn absent the injury. *Walker*, 793 F.2d at 323; *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980).

When making the calculation of Claimant's annual earning capacity under Section 10(c), the amount actually earned by Claimant is not controlling. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288, 1292 (9th Cir. 1979), *aff'g* in relevant part, 5 BRBS 290 (1977). Therefore, the amount Claimant actually earned in the year prior to his accident is a factor, but is not the overriding concern, in calculating wages under Section 10(c). *Gatlin*, 936 F.2d at 823. When a claimant receives a pay raise shortly before his injury, the claimant's actual wages are not a controlling factor because they reflect earlier work at a lower rate of pay. *Le v. Sioux City and New Orleans Terminal Co.*, 18 BRBS 175, 177 (1986); *Lozupone v. Lozupone & Sons*, 14 BRBS 462, 464-65 (1981) (stating that a determination of wage earning capacity must include recent pay increases and a reasonable method of calculating wage earning capacity is to multiply the wage at the time of the injury by the number of hours normally available to the claimant).

Claimant argued his earning capacity is best measured by calendar year 1993 when he earned \$51,030.32, yielding an average weekly wage of \$981.35. Claimant also argues he received yearly increases while working for Employer averaging \$1,880.00 per year, and any weekly wage calculation should incorporate an annual adjustment of \$36.15 per week to reflect that earning potential.⁸ Employer contends Claimant's average weekly wage was \$901.19 as reflected by the fifty-two weeks preceding his workplace injury. I find the best measure of Claimant's earning capacity is the actual amount Claimant earned in the fifty-two weeks preceding his

⁸ I find it inappropriate to increase Claimant's average weekly wage based on a future expectancy which he may or may not have received. The Act speaks clearly in terms of "average weekly wage of the injured employee at the time of the injury" as a basis upon which to compute compensation. 33 U.S.C. § 910 (2002).

injury as this calculation best conforms to the statutory determination Congress intended in Sections 10(a)(b) & (d). In making this determination, I note that Claimant was injured on September 26, 1992, and he never lost any time due to his workplace accident. In the twelve months preceding his injury, Claimant earned the following amounts:⁹

| | |
|----------------|------------|
| September 1992 | \$4,499.45 |
| August 1992 | \$4,176.00 |
| July 1992 | \$3,935.00 |
| June 1992 | \$3,935.00 |
| May 1992 | \$4,025.00 |
| April 1992 | \$3,935.00 |
| March 1992 | \$3,935.00 |
| February 1992 | \$3,935.00 |
| January 1992 | \$3,935.00 |
| December 1991 | \$3,790.00 |
| November 1991 | \$3,740.00 |
| October 1991 | \$3,780.00 |

(CX 17).

For the above twelve months, Claimant earned \$47,620.45. Under Section 10(d)(1), Claimant's average weekly wage is one-fifty-second part of his average annual earnings, thus, Claimant's average weekly wage is \$915.77 per week, with a corresponding weekly compensation rate of \$610.51.

H. Credit for Employer's Salary Continuation Plan Payments Made in Advance of Compensation Award

Employer paid Claimant his full salary from May 11, 1994 to June 12, 1995 under a salary continuation plan funded by Employer with no contribution by employees. (JX 1). Employer seeks a

⁹These monthly sums include a base pay, overtime, safety bonuses and a bonus entitled "OFSH OTH." (CX 17). No showing was made that these bonuses should be excluded in Claimant's weekly wage calculation.

credit of all sums paid under the salary continuation plan against compensation owed because the terms of the plan provide:

The amount of income you receive from CIDP after termination from employment is reduced by the income you receive or are eligible to receive from other income benefits, whether or not actually paid, had you made a timely application under any or all of the following:

1. Workers' Compensation benefits either paid or payable for the period of time benefits were received under CDIP.

(Empl. Br.)

Under Section 14(j) of the Act, an employer is entitled to reimbursement out of unpaid installments of compensation for any advance payments of compensation made to an injured worker. 33 U.S.C. § 914(j) (2002).

In the case of *Luker v. Ingalls Shipbuilding*, 3 BRBS 321, 326 (1976), the Board held a credit for payments made under a salary continuation plan were not "advance payments of compensation" within the meaning of Section 14(j) of the Act. Ingalls's salary continuation plan was based on seniority, and employees received a continued salary whether they were sick or injured due to an accident. *Id.* The plan was an employee benefit earned through good continuous service and the employee paid nothing for the plan. *Id.* Reasoning that the definition of "compensation" under Section 2(12) of the Act, which included a money allowance payable "as provided for in this Act,"¹⁰ was synonymous with obtaining workers' compensation coverage, the Board determined the language of 14(j) providing a credit for "compensation" made in advance had the same meaning as "compensation" under Section 2(12). The Board determined a salary continuation plan did not fall within that category. *Id.* Rather than being "compensation" pursuant to a workers' compensation plan, Ingalls's program was payment of sick leave benefits earned on the basis of seniority and good continuous service. *Id.* Accord *Seaco v. Richardson*, 136 F.3d 1290 (11th Cir. 1998) (determining container royalty, holiday and vacation payments

¹⁰ The actual language of the statute provides:
"Compensation" means the money allowance payable to an employee . . . as provided for in this chapter, and includes funeral benefits provided therein." 33 U.S.C. § 902(12) (2002).

were not advance payment in lieu of compensation pursuant to Section 14(j)); *Weber v. S.C. Loveland Co.*, 35 BRBS 190, 198-99 (2002) (remanding case for a determination of whether the employer wage continuation plan was intended as advance payment of compensation when it transferred an injured employee to a lower paying job but continued his previous salary); *Breem v. Olympic Steamship Co.*, 10 BRBS 334, 336 (1979) (noting the employer never filed with the deputy commissioner denominating salary continuation payments as "advance payments of compensation"); *Brandt v. Avondale Shipyards, Inc.*, 8 BRBS 698 (1978) (stating the employer must intend the payment of any benefits voluntarily conferred to be advanced payments for workers' compensation).

In *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 317-18 (5th Cir. 1997), the Fifth Circuit granted *Shell Offshore, Inc.* (*Shell*) a partial credit pursuant to its salary continuation plan after determining part of the plan was intended to constitute "advance payment of compensation." Importantly, *Shell's* salary continuation plan provided an employee with twenty-six weeks of full pay and twenty-six weeks of half pay. *Id.* at 318. During the half-pay periods, disability benefits were reduced if the half pay, plus any workers' compensation benefits, totaled more than the worker's full pay. *Id.* The Fifth Circuit affirmed the reasoning of the ALJ, as based on substantial evidence, who relied on the testimony of *Shell's* human resources representative that the half-pay benefits were not intended as advance compensation payments.¹¹ *Id.* On the other hand, the Fifth Circuit affirmed a Section 14(j) credit for the full compensation benefits finding the intent of such payments was for "advance compensation."¹² *Id.*

In this case, I find that the intent of Employer's salary continuation plan was not "advanced payment of compensation."

¹¹ Moreover, *Shell's* plan provided that full wage benefits were to be offset by workers' compensation payments and the half-wage payments were not to be so offset. *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 318 (5th Cir. 1997).

¹² *Shell* argued that the decision of the ALJ did not make sense because both benefits were from the same plan, the purpose of which was to compensate an injured employee. *Id.* *Shell* argued the only change in intent was the amount of benefits paid and not the purpose, but the Fifth Circuit determined the argument was not strong enough to overcome the testimony of a *Shell* employee that the half-payments were not intended as "advance compensation." *Id.*

Significantly, the amount of income an employee could receive under Employer's CDIP plan was reduced by the income the employee received, or was eligible to receive, not only from workers' compensation benefits, but also from Social Security (including portions paid to dependants), any other compulsory government program, and any other retirement plan administered or contributed to by Employer. (Empl. Br.). The plain language of the plan provides that payments are reduced by the payment of workers' compensation benefits, not that the salary continuation payments are credited against liability for such payments.¹³ In other words, the salary continuation program was not in lieu of any compensation owed. Furthermore, there is no evidence in the record showing Employer reported to the district director that its salary continuation benefits were payments of compensation pursuant to the Act under Section 14(c). 33 U.S.C. § 914(c) (2002). Additionally, the salary continuation plan provides for a reduction in payments based on the eligibility to receive any other form of disability payments or retirement program contributed to by Employer. This provision exceeds the scope of compensation "liability" as provided in Section 3(e) of the Act.¹⁴ 33 U.S.C. § 903(e) (2002). Rather, like Luker, I find that Employer's plan was payment of sick leave benefits and was not intended as a surrogate "compensation" plan as provided for in the Act.

¹³ While there is no dispute Claimant paid nothing out of his paycheck for this benefit, other information that would be helpful in determining the intent of Employer is whether or not the salary continuation program was the result of negotiations with an employee union or just a mere gratuity bestowed by Employer.

¹⁴ Section 3(e) of the Act provides a credit for benefits paid under other laws. It reads:

Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law . . . shall be credited against any liability imposed by this chapter.

33 U.S.C. 903(e) (2002)

By its express terms, a Section 3(e) credit is only available to a claimant pursuant to the law and does not include a voluntary or negotiated private disability program.

I. Medical Benefits

In general, an employer whose worker was injured on the job is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Ingalls Shipbuilding Inc. v. Director, OWCP*, 991 F.2d 163 (5th Cir. 1993); *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977). Section 7(d) of the Act sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by a claimant by requiring a claimant to request his employer's authorization for medical services performed by any physician. *Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981) (Miller, J., dissenting), rev'd on other grounds, 682 F.2d 968 (D.C. Cir.1982).

Having established that Claimant's injuries were caused by his workplace accident and the extent of that injury is continuing with Dr. Clark opining Claimant would likely need treatment for the remainder of his life, (CX 13, p. 57), I find that Claimant is entitled to medical benefits under the Act. Medical benefits include mileage expenses Claimant reasonably expended in seeking medical treatment. See *Day v. Ship Shape Maintenance Co.*, 16 BRBS 38 (1983).

J. Expenses Paid By a Private Health Insurer

Employer argues it is only liable under Section 7(d) of the Act for amounts expended by Claimant in securing work-related medical treatment and that does not include amounts expended by a private insurance company on behalf of its insured. A similar argument was raised before the Board in *Plappert v. Marine Corps Exchange*, 31 BRBS 109, 111 (1997), where the employer argued "pursuant to *Nooner v. National Steel & Shipbuilding Co.*, 19 B.R.B.S. 43, 46 (1986), the Claimant cannot recover for medical bills her health insurer paid for." The Board stated:

It is clear from a review of the regulations that employer did not adequately brief the issue. One reference to a single authority, leaving the Board to extrapolate the argument and conclusion, does not constitute adequate briefing. However, for the sake of clarification, we note that employer is liable to claimant for all medical expenses related to this injury paid by claimant, and for all medical expenses related to this injury paid by claimant's private health insurer, provided the private health insurer files a claim for reimbursement of same.

Plappert, 31 BRBS at 111 (citations omitted).

Like Plappert, the issue of reimbursing Claimant for medical expenses paid by a private health insurer was not adequately briefed. Claimant's private health insurer did not file an intervention in this case. I find no reason to depart from the Board's most recent precedent, and find that Claimant is only entitled to reimbursement of out of pocket medical expenses.

K. Entitlement to Benefits

Claimant's average weekly wage at the time of his September 26, 1993 workplace accident was \$915.77 per week, with a corresponding compensation rate of \$610.51. Following his injury, Claimant continued in the same position performing modified work at the same rate of pay until May 10, 1994. Claimant had no economic disability during this time period. Claimant reached MMI on January 25, 1993. When Claimant was no longer able to perform his modified work on May 11, 1994, he became permanently totally disabled. At that time, Claimant's compensation rate was \$610.51 per week and subject to adjustments pursuant to Section 10(h) of the Act. 33 U.S.C. § 910(h) (2002).

Employer established suitable alternative employment on January 4, 1999. At that time, Claimant's disability changed from permanent total to permanent partial based on Section 8(c)(21) of the Act. 33 U.S.C. § 908(c)(21) (2002). Under that provision, Claimant's compensation rate is set as 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage earning capacity. Id. Before calculating those benefits, however, Claimant's earning capacity in the alternative employment must be adjusted to account for any wage inflation between the date of injury and the date suitable alternative

employment became available. *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157 (9th Cir. 2002) (stating the Act contemplates the current dollar amount of wage earning capacity be adjusted back in time to account for post-injury inflation and general wage increases); *LaFaille v. Benefits Review Board, US. Department of Labor*, 884 F.2d 54 (2nd Cir. 1989) (requiring Board to express its finding "of the residual wage earning capacity in terms of the time-of-injury equivalent of the residual earnings, since general wage increases and inflation would otherwise distort the comparison required under §8(c)(21)); *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 321 (D.C. Cir. 1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (1980). If there is no evidence of the earning potential of the particular job at the time of a claimant's injury, the necessary adjustment may be made by decreasing the claimant's earnings by the increases in the National Average Weekly Wage since the date of the injury. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

The National Average Weekly Wage for the period covering September 26, 1992 was \$349.98. See U.S. Department of Labor, Employment Standards Administration, Division of Longshore and Harbor Workers' Compensation, National Average Weekly Wages (NAWW), Minimum and Maximum Compensation Rates, and Annual October Increases (Section 19(f)), at <http://www.dol.gov/esa> (Visited January 13, 2003). The National Average Weekly Wage for the period covering January 4, 1999 was \$435.88. *Id.* That rate was unchanged on July 1, 1999, when Claimant's wages increased to \$27,200 per year. *Id.* When Claimant's wages increased to \$28,200 per year on October 1, 2000, the National Average Weekly Wage was \$466.91, and on October 1, 2001, when Claimant's annual rate increased to \$30,500 per year, the National Average Weekly Wage was \$483.04. *Id.*

On January 4, 1999, Claimant's weekly wage was \$500.00 per week. ($\$26,000 \div 52 = \500.00). The increase in the National Average Weekly Wage between September 26, 1992 and January 4, 1999 was 24.54%. ($435.88 - 349.98 = 85.90$. $85.90 \div 349.98 = .2454$). Reducing Claimant's January 4, 1999 wage rate to September 1992 standards, equates to an average weekly wage of \$377.30. ($500.00 \times 24.54\% = 122.70$. $500.00 - 122.70 = 377.30$). Under Section 8(c)(21) this results in a permanent partial disability payment of \$358.98. ($915.77 - 377.30 = 538.47$. $66 \frac{2}{3} \times 538.47 = 358.98$). When Claimant's earning capacity increased to \$27,200 per year on July 1, 1999, or \$523.08 per week, his permanent partial disability payment decreased to \$347.37 per week.

When Claimant's annual earnings increased to \$28,200 per year on October 1, 2000, or \$542.31 per week, the National Average weekly wage had increased 33.4% over September 1992, resulting in an adjusted weekly wage rate of \$361.18, and a permanent partial disability award of \$369.73. When Claimant's annual earnings increased to \$30,500 per year, or \$586.54 per week, on October 1, 2001, the National Average Weekly Wage was \$483.04, representing a 38.02% increase over September 1992, and representing an adjusted weekly wage rate of \$363.54 and a permanent partial award of \$368.15 per week. Employer is entitled to a credit for all compensation paid under the Act, not including payments pursuant to its salary continuation plan.

Claimant also submitted voluminous medical bills. As determined, supra, Claimant is entitled to reimbursement for all his medical expenses, including mileage, notwithstanding the fact that a private insurer paid a portion of Claimant's bills. Employer is entitled to a credit for all medical bills paid to date.

L. Conclusion

I find that Claimant is a credible witness. Under Section 10(c) of the Act, Claimant's average weekly wage at the time of his September 26, 1992 workplace injury was \$915.77 with a corresponding compensation rate of \$610.52. Claimant's current multi-level bulging and slightly desiccated discs, facet disease at L5-S1, mild forminal narrowing at L5-S1, compression fracture at L3, mild early neuropathy, and pain consistent with L5 radiculopathy and a problem nerve root at L5 are causally related to his workplace injury. The extent of Claimant's injury allowed him to continue in his former job as modified until May 10, 1994, and thereafter Claimant was restricted to no: sitting, standing or walking for excessive periods; working at elevations; lifting over thirty pounds; repetitive floor to waist lifting; and driving long distances. Claimant needed a position that allowed for frequent position changes. Claimant reached maximum medical improvement for his injury on January 25, 1993. On May 11, 1994, Claimant became permanently totally disabled until Employer demonstrated suitable alternative employment on January 4, 1999, at which time Claimant became permanently partially disabled. Claimant had no legal obligation to submit to further vocational counseling and Claimant's failure to cooperate did not affect the extent of his disability in establishing alternative employment. Employer is not entitled to a credit against compensation for its salary continuation plan. Because Claimant proved his disability was related to his workplace injury, he is entitled to medical benefits

and mileage expenses in obtaining reasonable and necessary medical treatment. Employer is not obligated to reimburse Claimant for the medical expenses paid by his private insurer.

M. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd* in pertinent part and *rev'd* on other grounds, *sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See *Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

N. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein. Counsel is allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay permanent total disability benefits from May 11, 1994 to January 3, 1999, pursuant to 33 U.S.C. § 908(a) based on an average weekly wage of \$915.77, and a corresponding compensation rate of \$610.52, adjusted periodically beginning on October 1, 1994, according to 33 U.S.C. § 910(h) (2002).

2. Employer shall pay permanent partial disability benefits from January 4, 1999 to June 30, 1999, pursuant to 33 U.S.C. § 908(c)(21), based on an average weekly wage of \$915.77, an adjusted average weekly wage of \$377.30, and a corresponding compensation rate of \$358.98.

3. Employer shall pay permanent partial disability benefits from July 1, 1999 to September 30, 2000, pursuant to 33 U.S.C. § 908(c)(21), based on an average weekly wage of \$915.77, an adjusted average weekly wage of \$394.72, and a corresponding compensation rate of \$347.37.

4. Employer shall pay permanent partial disability benefits from October 1, 2000 to September 30, 2001, pursuant to 33 U.S.C. § 908(c)(21), based on an average weekly wage of \$915.77, an adjusted average weekly wage of \$361.18, and a corresponding compensation rate of \$369.73.

5. Employer shall pay permanent partial disability benefits from October 1, 2001, and continuing, pursuant to 33 U.S.C. § 908(c)(21), based on an average weekly wage of \$915.77, an adjusted average weekly wage of \$363.54, and a corresponding compensation rate of \$368.15.

6. Employer shall pay for all reasonable and necessary medical expenses, pursuant to 33 U.S.C. 907(a), including, but not limited to, reimbursement of Claimant's out of pocket medical and mileage expenses.

7. Employer shall be entitled to a credit for all medical benefits paid and all compensation paid, but Employer is not entitled to a credit against compensation benefits for payments made under its salary continuation plan.

8. Claimant is entitled to interest on accrued unpaid compensation benefits. The applicable rate of interest shall be

calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

9. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

ORDERED this 28th day of January, 2003, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge